

[Unapproved and Subject to Change]
CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION
MINUTES OF MEETING, Public Session

October 12, 2005

Call to order: Chairman Liane Randolph called the monthly meeting of the Fair Political Practices Commission (Commission) to order at 10:00 a.m., at 428 J Street, Eighth Floor, Sacramento, California. In addition to Chairman Randolph, Commissioners Sheridan Downey, Eugene Huguenin, and Ray Remy were present.

Item #1. Public Comment.

There was none.

Consent Items #2-15.

Commissioner Downey asked to pull item #9 from the group of consent items.

Chairman Randolph noted that this meeting is Deanne Canar's last meeting. She is retiring after sixteen years at the Commission. Her service to the FPPC is very much appreciated.

Commissioner Huguenin moved to approve the following items in unison:

Item #2. Approval of the September 1, 2005, Commission Meeting Minutes.

Item #3. In the Matter of De Anza College, FPPC No. 02/363 (1 count).

Item #4. In the Matter of Terry Tognazzini and RR Tog, L.P., d.b.a. Red Roof Inns Southern California, FPPC No. 03/617 (18 counts).

Item #5. In the Matter of Chris Norby, Norby for Supervisor, and Michael Di Costanzo, FPPC No. 02/432 (2 counts).

Item #6. In the Matter of Stephen E. Benson, Committee to Elect Steve Benson Judge, and Eugene C. Hancock, FPPC No. 02/503 (2 counts).

Item #7. In the Matter of Retired Saratoga Volunteer Firemen, Inc., FPPC No. 02/012 (2 counts).

Item #8. In the Matter of Retired Eileen Mc Donald, FPPC No. 04/002 (2 counts).

Item #10. In the Matter of Therese Hankel, FPPC No. 05/433 (1 count).

Item #11. In the Matter of Andrew Whitman, FPPC No. 05/432 (1 count).

Item #12. In the Matter of Vivianna Wolinsky., FPPC No. 04/416 (1 count).

Item #13. In the Matter of John Larse, FPPC No. 04/640 (1 count).

Item #14. Failure to Timely File Donor Campaign Statements.

- a. **In the Matter of John Garland Bowes, FPPC No. 05-0465 (1 count).**
- b. **In the Matter of Marlin & Saltzman, A.P.C., FPPC No. 05-0486 (1 count).**
- c. **In the Matter of American Civil Liberties Union of Northern California, FPPC No. 05-0490 (1 count).**
- d. **In the Matter of Golden Corral Corporation, FPPC No. 05-0491 (1 count).**

Item #15 Failure to Timely File Late Contribution Reports – Proactive Program.

- a. **In the Matter of Monterey County Republican Central Committee, FPPC No. 05-0012 (1 count).**
- b. **In the Matter of Californians for Schwarzenegger, FPPC No. 05-0369 (14 counts).**
- c. **In the Matter of Arnold Schwarzenegger’s Total Recall Committee, FPPC No. 05-0370 (3 counts).**
- d. **In the Matter of The First American Corporation, FPPC No. 05-0374 (1 count).**
- e. **In the Matter of California State Association of Counties – Non Public Funds, FPPC No. 05-0377 (1 count).**

Commissioner Downey seconded the motion. Commissioners Downey, Huguenin, Remy, and Chairman Randolph supported the motion, which carried with a 4-0 vote.

ITEMS REMOVED FROM CONSENT

Item #9. In the Matter of Sean MacNeil, FPPC No. 04/001 (10 counts).

Commissioner Downey questioned whether Sean MacNeil violated section 81004(a) by signing the verification for the Assembly member or if the then-Assemblywoman Patricia Wiggins violated the section by allowing Mr. MacNeil to sign.

Assistant Division Chief William L. Williams, Jr. explained that in his review of this case with Enforcement, it was decided that, although it could be an aiding and abetting case, further study clearly showed that the Respondent had done all of the actions on his own, without the consent of the Legislator, and therefore Sean MacNeil had caused the violation of section 81004(a) on his own.

Commissioner Downey asked to clarify if it was being said that Mr. MacNeil did all of the acts that caused the Legislator to violate the section.

Mr. Williams replied that Sean MacNeil did all of the acts that caused the section to be violated. He continued that the section sets out that the verification must be signed by a specific person, which the Respondent was aware.

Chief of Enforcement, John Applebaum, interjected to clarify that all reports have to be signed under penalty of perjury and in this situation the Legislator had not signed the report and Sean MacNeil did so on her behalf. He had been warned previously not to do so and did it anyway. Enforcement felt that this action needed to be taken to show that the actions of Mr. MacNeil were not appropriate.

Commissioner Huguenin moved to approve Item #9. Commissioner Remy seconded the motion. Commissioners Huguenin, Remy, and Chairman Randolph supported the motion. Commissioner Downey abstained. The motion was approved with a 3-0 vote.

DISCUSSION ITEMS

Item #16. Strategic Plan Discussion.

Legal Division

Luisa Menchaca, General Counsel for the Commission, referred to the staff memorandum that was distributed prior to the meeting describing the major functions of the Legal Division and some suggestions for updating the Commission's Strategic Plan. She highlighted some of the points in the memorandum for further discussion. Ms. Menchaca also noted that many of the suggestions in the staff memorandum were done with staff input. The memo highlights eight major areas of division work, litigation, regulatory work, legislation, written advice and oral advice, opinions, public education, in-house counsel duties, and overall management of the division. She explained that the division consists of only ten staff members and that this staff shortage combined with diminishing resources continues to put strain on the division. Approximately fifty percent of the work is dedicated to statutory mandates, in particular, the issuance of advice letters and necessary regulatory work to implement and administer the Political Reform Act. The rest of the workload is divided into essential functions as well, but the

amount of time spent on each function fluctuates with activity in a certain area or time period. Ms. Menchaca explained that when a particular activity engulfs the work of the division, the other functions, such as public education or proactive work relating to legislation, may be somewhat diminished. As a manager, one of Ms. Menchaca's primary goals is to fulfill the primary functions in a way the best serves the public. The division is constantly striving to meet the demands of the public with shrinking resources. However, diminishing resources are a reality of state government and there are always ways to increase efficiency and maximize the use of resources. The fact that the agency is very small means that reductions in resources and staff have a larger effect on both the staff and the efficiency of the division. Overall, the staff reductions throughout the agency have a greater proportional negative impact than larger agencies and this should be a key consideration in terms of the Strategic Plan development and updating.

Ms. Menchaca listed the proposals from the staff memorandum that would assist the division in continuing to fulfill the mandates of the Political Reform Act with the current resources. The first is a recommendation that the division continue to attempt to reduce the amount of time it takes to issue advice letters to persons who have duties under the Act. Suggestions for ways to do this were to direct resources from other areas to this function, reduce informal assistance or eliminate it altogether, and increase the turnaround time that is required for advice letters. Another recommendation is that the Commission increase its educational programs because it is believed that better education will reduce the number of inadvertent violations. Publishing reports on research topics to evaluate the ethics of current laws, and focusing on internal management of the Commission by reviewing and updating current policy were also recommendations from the Legal Division to allow for increased productivity. Lastly, Ms. Menchaca explained that in order to reach all of the goals set for the division it is further recommended that the Commission take the necessary steps to increase the retention of staff and to improve efficiency. This includes offering more training for attorneys and support staff, and lifting the cap for senior counsel which is set at 55%. Ms. Menchaca concluded by saying that although efficiencies need to be examined, the issue of diminishing resources will also need to be addressed shortly or certain functions within the division will be severely impacted.

Chairman Randolph asked for more information regarding the 55% senior attorney ratio.

Executive Director Mark Krausse explained that the information on that issue is in the bargaining unit agreement for unit two, the attorney unit. He explained that ratio cap means that in any given unit or division, the number of attorneys in the highest classification available (whatever the top classification is for that division) cannot exceed 55% of all of the other classifications below it in that division. Mr. Krausse continued that the goal is not to change the 55% cap rule, but rather, to get a position for the classification above the highest classification (currently Senior Attorney III in the Commission) so that the 55% rule would now apply to Senior Attorney IV employees and the number of Senior Attorney III positions would be unlimited. This would allow for anyone who spends sufficient time in the division to move into the senior ranks.

Commissioner Huguenin asked whether the problem is that the Commission does not have comparable salaries to other offices, but that the higher positions are not available to offer

promotions. He opined that the loss of staff to other agencies is largely due to promotional opportunities, not because of salaries.

Mark Krausse said that is correct with regard to the attorney positions, but in other areas of classifications, such as investigators, there are higher salaries and better benefits available in the Peace Officer classifications so people do sometimes leave to take one of those positions. In the auditor/accounting specialist category, the positions at other agencies have a 10% higher limit on their pay and it is often the case that the Commission auditors are overseeing other auditors in performing the Political Reform Act audits, but making less money.

Chairman Randolph opened the floor to public comment on the Legal Division presentation.

There was none.

Technical Assistance

Carla Wardlow, Technical Assistance Division Chief, referred to the staff memorandum that explains the functions of the Technical Assistance Division. She said that 80% of the staff's time is spent answering the telephone and that they handle the call volume very well as they are dedicated to that function and what the Political Reform Act stands for. Ms. Wardlow explained that the biggest needs in the division are in the area of training and the resources to do training outside of Sacramento. Much of the focus is on the state campaigns and state filers, when in actuality, the majority of the regulated community is at the local level. Due to budget cuts in the past, the division has not had the opportunity to get out in the community and offer training to local candidates, committees and filing officers. This was most apparent after the loss of four staff services analyst positions in 2004. These positions not only handled much of the training and outreach, but also absorbed much of the filing officer reviewing of statements of economic interest and the logging function, which allowed the political reform consultants to focus on other projects. So when these positions were lost, much of the work was pushed up to the political reform consultant level.

Ms. Wardlow advised that the Technical Assistance Division would like to have the money to travel out into the community and resume some of the training that has been lost and also to get back some of the analyst positions. Ms. Wardlow also addressed the problems with changes in the law. It seems that every time the campaign manuals are updated, the laws change and the manuals are no longer current. In 2000, passage of Proposition 34 resulted in having to dispose of manuals that were being updated and starting over.

Ms. Wardlow concluded with a recommendation that the Commission think seriously about adding resources back to the division and focusing on some training outside of Sacramento.

Chairman Randolph added that outside training is a key component of the service area of the Commission and something that will be necessary in the future.

Commissioner Remy asked why the Commission does not charge for these services, as most cities do.

Mark Krausse responded that the Commission has looked into charging for services in years past but feared that it would deter people from calling. Instead it was suggested that the Commission look for other sources of funding such as with the League of Cities or CSAC, rather than charging those who are requesting assistance.

Chairman Randolph added that the Commission encourages calls for assistance and advice because it is always better to instruct people on the correct methods on the front end, rather than after it has been done incorrectly. It is for this reason that there is a toll free phone number; because providing technical assistance is part of the Commission's statutory mission. It is the responsibility of the state to provide the necessary resources to fulfill the mission that the people of California gave to the Commission.

Commissioner Remy agreed but noted that unfortunately the state is not providing that funding. He suggested options involving the Institute for Local Government and the Special Districts Association where the Commission would be reimbursed for the time that they would provide during events put on by these programs.

Chairman Randolph asked for any other comments or questions.

There were none.

Enforcement

John Applebaum, Enforcement Division Chief, began his presentation using visual aids in the form of slides showing graphs and charts of data on division staffing numbers versus workload going back two decades and continuing to the present. Enforcement is currently staffed slightly above what the division was staffed in the early nineteen-eighties and this has presented numerous challenges. Difficulty staffing the vacant positions combined with a very high turnover rate has contributed to these challenges. Just since May of this year Enforcement has lost three staff counsel. Over the course of the year, seventy percent of the staff has turned over, and over the last three years, one-hundred fifteen percent of the staff has turned over. That is a complete turnover in three years. It takes about a year to get a new staff member trained on the Political Reform Act, which is the act that the division enforces, because the act is a very intricate and complex piece of legislation. This increases the impact of losing staff members because not only does the remaining staff have to pick up the workload from the vacant position, but they also have to train new staff members thoroughly before they are able to help with the workload. Thus it creates a huge lag time in Enforcement.

Mr. Applebaum explained the biggest concern in Enforcement is with the caseload and the time that each case can take to review and, if necessary, prosecute. Regardless of whether or not a case states a violation, it will still absorb staff because all documentation must be reviewed and intake functions must be performed to evaluate the claims. He added that Enforcement has more claims than can be prosecuted at current staffing levels. There are a number of claims that have merit but given the staffing turnover and vacant positions the division cannot review them all. As a result, the staff is actively in a triage process, closely reviewing claims upon intake for

those needing the most attention based on what the violations are or if there is public harm involved. The goal is to weed out cases that are less serious before resources are spent on them so that when the cases get to the attorneys, the number is a more manageable one.

Mr. Applebaum said that one issue to look at is what is causing the high turnover of staff. The main reason is the pay scale for attorneys here when compared to other agencies, which pay more across the board. Generally in other departments the counterparts of the staff here are paid more or given better benefits such as Peace Officer benefits and Safety retirement. This creates a huge moral problem for staff here and this causes the high turnover.

Mr. Applebaum mentioned that in addition, in 2004 there was a spike of complaints, due mostly about seven hundred unfounded complaints filed by one individual and that diverted a large amount of resources away from processing meritorious claims. Large numbers of complaints like this can have a huge impact on the division. Another issue is regarding the number of civil cases prosecuted, which are cases that are filed in superior court. There has been a significant increase the number of these cases as well. Civil cases are those that have the highest amount of public harm. These cases absorb the most resources and are the most time sensitive. The staff often has to put aside other cases to focus on the civil cases and this contributes to the backlog of cases.

Mr. Applebaum explained several things being done to cope with these issues. In addition to more closely reviewing cases during the intake phase so that the division does not devote resources to cases it ultimately cannot prosecute, there are other practices being added to help make the best use of the available resources. Staff realignment is one of these processes to assist with the workload. The division is evaluating what each of the staff do and has taken some PRCs (Political Reform Consultants) and had them working on major donor cases that may not qualify for the streamline program and have less public harm to free up the attorneys for the more significant public harm cases. He said that the division is taking a more aggressive approach to investigations, pushing the process more by shortening deadlines to try and complete the cases in a timely manner. In the same respect, a more aggressive prosecution approach is being taken by attorneys stipulating firmer deadlines and keeping the cases moving. Streamline reviews now include a tracking process that is discussed during the case reviews. If cases are not moving, the cause will be determined during the review so that the staff is aware of the delays and can then take an aggressive posture to keep a continuing progress. Lastly, the most difficult aspect of managing the caseload involves the older cases and having to close some cases that do have merit because there are not enough resources to prosecute all of the older cases and to deal with the new cases in a timely manner. The decisions to close these cases are difficult ones for the division to make.

Mr. Applebaum concluded by reiterating that long term strategies for Enforcement obviously include additional staffing. Anytime a case that has merit has to be closed due to not having enough resources to prosecute it is a bad result. Staffing is critical; both bringing on new staff and definitely retaining the current staff. More effort needs to be made to offer adequate pay and better benefits to prevent staff from going elsewhere. The work itself is very demanding with a lot of high stakes outcome and large caseloads. It is imperative that the division retain those people who understand the Political Reform Act. Internally, in order to be more efficient, the

Commission can establish case guidelines to ensure that cases proceed quickly and review cases to ensure that that is happening. More remedies will be proposed shortly to assist with these strategies.

Chairman Randolph asked if there were any questions for Mr. Applebaum.

Commissioner Remy requested some clarification on jurisdictional issues regarding how the Commission divides up and handles violations and wrongdoing that occur. Does the Commission wait to be asked to step in and investigate or does it just begin an investigation immediately.

Mr. Applebaum explained that the Commission has proactive outreach programs at the local level that help us determine if there are violations going on. It is helpful if there is a local ethics commission involved because they have a greater interest in timely review of these cases. Often the cases are prosecuted at the local level and those that are referred back to us are considered based on the available resources if we can handle the case.

Commissioner Remy asked what the result would be of the Commission not being able to handle the cases statewide, which the Political Reform Act states that it should handle both local and statewide.

Chairman Randolph replied that there is part of the budget earmarked for local enforcement so there is a local enforcement component that the Commission needs to adhere to regarding budget responsibilities. However, at some point the Commission has to pick and choose how to handle things. Choosing cases local versus state is probably less efficient because the Commission currently evaluates cases on levels of public harm and on required resources to determine if it can handle each case. So the decisions are already difficult ones to make. To separate local and state cases and just prosecute state cases would be less efficient because it is possible that a local case may be more important to take on than some state cases.

Commissioner Huguenin asked whether the earmarked budgetary funds for this purpose could be used for statewide things as well or just for local cases. He wondered whether the money included in the total sum was allowed for prosecuting cases, or specifically for local issues.

Mark Krausse explained that the local enforcement segment of budget was an augmentation about two decades ago that allowed funds for that purpose. Whether or not the Commission can legally use that money for other purposes is unclear but it may hurt its relationship with the Department of Finance.

Chairman Randolph asked for any public comment on the enforcement component.

There was none.

Commissioner Huguenin mentioned that the agency is somewhat “two-headed” in that it has technical advice that attempts to prevent violations of the act while at the same time enforcing the act by processing and prosecuting claims of violations.

Mr. Applebaum replied that he works very closely with the other divisions to give the correct advice and information to prevent the violations in the first place. Regardless the Commission will still have a large number of cases coming in the door, more than it can handle. The staff looks at the degree of public harm that was involved when triaging cases.

Commissioner Huguenin asked if there was a way during triage to take the very low level of public harm and violations cases and do some kind of advice or redirection to show those people how not to violate the act.

Mr. Applebaum clarified that when the cases that do get closed without prosecution are in fact closed, there is always a warning or advisory letter sent to the individual explaining the violation and what should be done in the future. The filers are always informed of the reasons that their cases were not prosecuted.

Chairman Randolph explained that there are several suggested actions from Mark Krausse's previous memo and in each of the division memos. Some of the recommendations will require funding but some can be done internally, without additional funding. The next step will include a proposed Strategic Plan that will be drafted and ready for review at the next Commission meeting.

Commissioner Huguenin inquired as to what would be an optimal agency regarding the staffing and dollars it would take to do what the divisions have said they needed to do. He also asked what the Commission would look like if there were no changes in staffing or funding, but if it just did current maintenance. He further asked what it would look like at minimal, staffing or funding at less than it is now. He suggested trying to identify potential functions would have to be turned back or eliminated if not better funded. Another suggestion was to again look at fees, charges, cost recovery, and matching programs in the areas of training or technical assistance. He also mentioned considering the concept of opposing all legislation that has a net increase in workload for the staff that is not covered in cost. Therefore, if we do not get money for the additional workload, we would oppose it. And last, could we review how much revenue the state is losing by our inability to run a more effective program because of lack of resources.

Mr. Krausse responded that we can do all of those things. However, regarding the last one, if you look at total dollars spent on the agency versus revenue collected and fines, it is not very accurate, unless you specifically compare just enforcements funding.

Chairman Randolph offered a final opportunity for any public comment.

There was none.

Commissioner Huguenin thanked the staff for the presentations. They were done very well.

Item #17. Pre-notice Discussion of Amendments to Regulations 18751, 18329.5, and 18701: Conflict of Interest Code Exemption.

Steven Russo, Senior Commission Counsel said that this project appears on the agenda for pre-notice discussion of proposed regulatory changes that are intended to provide greater substantive and procedural clarity to the process by which the Commission may grant to an agency an exemption from having to adopt a conflict of interest code. Section 87300, one of the original provisions of the Act, requires that every state and local government agency must adopt a conflict of interest code. Shortly after the Act was put into effect, the nature of the code requirement proved to be problematic in that it did not seem reasonable for all agencies, particularly those whose existence would be short lived or those that would engage in very little, if any, decision making at all, to go through the process of having to adopt a conflict of interest code. So regulation 18751 was adopted to put into place a process by which state and multi-county agencies may apply to the FPPC to obtain an exemption from the requirement. This provision was limited to state and multi-county agencies because those are the agencies for which the FPPC would be the filing officer if these agencies were to adopt a conflict of interest code.

Mr. Russo explained that currently the process requires an agency to submit a written request and specified informational materials about the agency to the Executive Director of the FPPC. The Executive Director must approve or deny the request on certain specified grounds. Those grounds would be that the agency is or will soon be inoperative, the agency would have no designated employees, the agency may be deemed to have no designated employees because certain requirements are satisfied, or the Executive Director, through the use of his discretion, determines that granting on exemption is appropriate.

Mr. Russo said that the biggest problem is that the exemption process is largely being bypassed in favor of other processes. The other processes were not designed to deal with exemption requests and, therefore, the requests are not coming in actual exemption requests, but indirectly. Additionally, these other processes do not contain the procedural safeguards that the exemption process has built into it. Another problem is that both the regulated community and the agency staff have found the criteria, as currently drafted, to be rather confusing, making it difficult to determine when the criteria have been satisfied. Certain agencies, those that have only an advisory function, and thus would be most clearly deserving of an exemption, are not specifically stated in the regulations to be eligible for an exemption. Finally, the process contains certain procedural gaps that can make application of the process difficult. It is in light of these problems that the staff is presenting amendments to regulation 18751, 18329.5, and 18701 to improve this process by which agencies may be exempted from the requirement to adopt a conflict of interest code. The amendments have six specific objectives.

Mr. Russo began with the first objective, which is to establish a better defined and more exclusive process by which an agency may obtain an exemption from having to adopt a code. The second is to reconcile the exemption process with the FPPC's current procedures for dealing with the exemption of new agencies through the code reviewing process. The third objective is to make the exemption process less forbidding, and therefore encouraging agencies to make use of this process. Fourth, to rephrase the criteria for granting an exemption to make these criteria easier to understand and apply. Fifth, to provide by regulation a clearer statement of which agencies are eligible for an exemption and which agencies are not. And sixth, to rectify the procedural gaps that have shown themselves to exist in the exemption process. As stated in the

memorandum, it is suggested that the amendments are looked at in accordance with each of the six objectives that they are intended to further.

Mr. Russo went on to the first objective, to establish a better defined and more exclusive process by which an agency is to be exempted from adopting a conflict of interest code. To achieve this objective, staff is proposing a series of regulatory amendments that are intended to draw sharper lines between the exemption process and the advice process, as well as to state more clearly that the exemption process is the exclusive process by which an agency is to be exempted. In regulation 18751, subdivision (b), specific language is proposed that would provide that a governmental body qualifying as an agency must adopt a conflict of interest code or be included within another agency's code, unless granted an exemption under regulation 18751. Also in subdivision (b), to specifically declare "obtaining an exemption as provided in this regulation is the exclusive means by which an agency may obtain an exemption from the requirement to adopt and promulgate a conflict of interest code." In addition, a new subdivision (c) is being proposed for regulation 18729.5, which is the regulation that covers Commission advice. This new provision would provide that the Commission may provide advice and assistance to a party for the purpose of determining whether the party is an agency, and therefore, whether the party must adopt a conflict of interest code; and may provide advice or assistance to an agency determining who should be designated in a conflict of interest code. However, upon the determination being made that a party qualifies as an agency and must adopt a conflict of interest code, the party may only be relieved of the duty to adopt a conflict of interest code by following the process set forth for an exemption in regulation 18751. A new subdivision (l) is to be added to regulation 18751 that distinguishes an exemption request from formal advice or informal assistance that is given to an individual concerning that individual's filing duties under an existing conflict of interest code.

Mr. Russo continued with objective two, to reconcile the exemption process with the FPPC's current procedures for dealing with new agencies through the code reviewing process. Under the current process, when Technical Assistance becomes aware that a new state or multi-county agency is coming into existence, technical assistance will contact the agency and make inquiries regarding whether the agency should adopt its own conflict of interest code or should be included within another agency's code. A letter may ultimately result from this contact. It would be issued by staff under current practice, approved by the Executive Director, and may advise the agency that it need not adopt a conflict of interest code because it does not have decision making authority. This has been, and is, a rather expeditious way of dealing with this issue. Questions have arisen, however, as to whether this process fits within the current regulatory structure provided by regulation for granting an exemption. Therefore, to reconcile these processes, language has been proposed to be added to regulation 18751 at subdivision (d) that would expressly give the Executive Director the authority to grant or extend an exemption from having to adopt a conflict of interest code to an agency on his own initiative, rather than having to wait for a request to come in from the agency. This would allow staff to continue to do what they are doing; contacting new agencies to determine if they meet the requirements for an exemption, but if the determination was made that the agency would not have to adopt a code then, instead of a staff letter going out, a letter would go out from the Executive Director, pursuant to the exemption process, that would declare that the agency is exempt from adopting a code.

Mr. Russo said, regarding the third objective, which is to make the exemption process less forbidding, that amendments are being proposed to subdivisions (e), (f), and (g) of regulation 18751 to try to tailor the materials that must be submitted with an exemption request to the specific kind of request that is being submitted. Also proposed is a subdivision (m) to be added, that would provide that a request to renew an exemption need only consist of a declaration that the circumstances supporting the original grant of exemption have not changed. Finally, to deal with the problem that the exemption process is too lengthy to be compatible with the 30-day requirements imposed on members of new boards and commissions to file an SEI under section 87302.6, a new subdivision (i) is added to regulation 18751 that would toll the running of the 30-day time limit while a request for an exemption is pending with the Commission. This is provided that this 30-day period has not already expired when this request is submitted. A similar tolling provision is also included to toll the running of the time that an agency must adopt a conflict of interest code under 87303.

Mr. Russo explained the proposed amendments for the fourth objective, to rephrase the criteria for granting an exemption to make the criteria easier to understand and apply. Subdivision (c)(1) would remain unchanged, as would subdivision (c)(2), except for giving the Commission the option to define the term “soon” as “within one year”. Regarding subdivision (d), it is proposed that this criterion be renumbered, putting all the criteria together in one subdivision (c). Also this criterion would be rewritten to remove the current cryptic language and try to deal with its subject in a more straight forward way. Specifically, language would be put in place that would exempt small advisory bodies from having to adopt a code. The factors that currently define what is considered a small advisory body would be retained; however, the budgetary element would be changed. It is currently stated at \$70,000 and would change to \$122,500. As to subdivision (e), which gives the Executive Director the authority to exempt an agency on a case-by-case basis, it is proposed that it be renumbered to put it in subdivision (c). More importantly, it is proposed that the Commission consider the option to delete this criterion altogether, or tie the criterion to a finding of good cause based on extraordinary circumstances.

Mr. Russo said as to the fifth objective, to provide by regulation a clearer statement of which agencies need not adopt a conflict of interest code. It is proposed that a provision to declare that agencies formed for the purpose of researching a topic and preparing a report or recommendation for submission to another agency that has final decision making authority be amended to regulation 18701, subdivision (a-1-b), with other subsections renumbered accordingly. By doing this, a method would be instituted by which agencies of this kind can be exempted from a code in an almost automatic fashion in that their lack of decision making authority would now be expressly stated.

Mr. Russo continued with the sixth objective which is to rectify procedural gaps that exist in the exemption process. Here a series of amendments are proposed to deal with specific problems that have been noted during the process. Specifically, it is proposed that language be added to subdivision (d) of regulation 18751 that will require any agency requesting an exemption to state the specific ground for the exemption in the request. Another change would be to provide interested persons with notification that an exemption request is granted or denied. Thus, under this regulation, in renumbered subdivision (j) and (k), the Commission shall send a copy of a letter granting or denying a request for exemption to anyone requesting such notice and the

FPPC would post a copy of the letter on its website so that interested persons could easily see whether an exemption has been granted or denied. Another proposed change is to correct the fact that currently there is no time limit on when a request may be made to reconsider an exemption request that is granted or denied. A provision is proposed to be added to subdivisions (j) and (k) requiring that a reconsideration request must be made within 30 days after the exemption has been granted or denied. Finally, a new subdivision (m) is proposed to be added to regulation 18751 that would provide for an exemption to terminate when the basis for that exemption no longer exists and for it to automatically expire after two years. This is to deal with the problem of an exemption being granted and there not being a mechanism in place to monitor whether the circumstances have changed and that the agency should be adopting a code. With this change, a corresponding provision is added to renumbered subdivision (j) that requires that the Executive Director state the basis for an exemption being granted. This is so that anyone looking at the agency's activities would know whether or not the basis for the exemption no longer exists and therefore, the agency must adopt a code.

Mr. Russo stated that this concludes the outline of the proposed changes to the exemption process. It is believed that with these changes, the process may work better both for agency staff and the regulated community.

Chairman Randolph asked for any comments or questions.

Commissioner Huguenin asked how many agencies are granted exemptions.

Mr. Russo replied that the Commission has not granted many exemptions, which is largely due to agencies finding it preferable to either: write in for advice as to whether or not the public officials have decision making authority or whether they are public officials, and thus get an answer as to whether they should be filing statements of economic interest; or they are going through the code reviewing process.

Chairman Randolph requested examples of agencies that may fit these categories.

Mr. Russo directed the Commission to examples noted in the memorandum but also said that the basic point is that there are a lot of agencies going in and out of existence, and often times these are small agencies, task forces, or committees that are being created for a specific limited purpose. If you look at the statute, all of these agencies are supposed to have codes or be included within a code. The problem is that these agencies do not really fit the code process because their resources are limited or they do not have decision making authority. There needs to be a way to allow for these agencies to exist without requiring compliance with the code adoption process.

Chairman Randolph asked if there were any other questions.

Commissioner Remy added that the time frame of one year may or may not be the right time frame for the regulation, although it does need to be defined. And regarding the extraordinary circumstances, expressed the same hesitance in that it may leave the Executive Director left to defend the basis for decisions as to why some requests are approved and others are not.

Chairman Randolph also suggested in regards to the \$120,500 budgetary element, that it be a round number of \$150,000.

Mr. Russo agreed that the round number would be appropriate.

Chairman Randolph added further that local agencies are not processing exemptions to her knowledge and that expecting local agencies to adopt a similar procedure might not be a realistic one, and that local agency outreach would be necessary.

Carla Wardlow responded that a mailing is sent to all the county agencies when the local agencies submit their biennial notices, which alerts the county agencies that they need to be actively reviewing these agencies.

Chairman Randolph allowed for any other questions or public comment.

There were none. The Commission agreed to schedule the amendments for adoption at the December meeting.

Item #18. Pre-notice Discussion of Amendments to Regulations 18700, 18707, and 18708 – “Public Generally” and “Legally Required Participation” as Affirmative Defenses to an Enforcement Action.

Commission Counsel Emelyn Rodriguez explained that the proposed amendments are offered to clarify regulatory language reflecting the Commission’s interpretation of sections 87101 and 87103. This regulatory project deals with the last two steps of the eight step conflict of interest analysis. The exceptions allow otherwise disqualified public officials to take a role in a governmental decision if certain criteria are met. Last year the Enforcement Division proposed these changes in order to provide guidance and to ensure that the Commission’s interpretation would be clearly, reflected in its regulations. Since the late 1970s, the Commission has treated both public generally “and” legally required participation as exceptions to the general rule. In August 2000 the Commission had asked staff to discuss in a memorandum whether the Commission’s interpretation of “public generally” as an exception is supported by the statutory language. Staff concluded that the Commission’s approach was the proper interpretation.

Ms. Rodriguez went on to say that in its September 2000 meeting, the Commission agreed with the conclusions of the staff memorandum and none of the commissioners objected to treating “public generally” as an exception. However, the Commission did not amend the regulations to explicitly state that “public generally” was an affirmative defense. Likewise, the Commission has also historically treated “legally required participation” as an exception. This limited exception allows an otherwise disqualified official to act only if the official’s participation in a governmental decision is required by law. The treatment of this rule as an exception is well settled and uncontroversial. There is case law supporting this view.

Ms. Rodriguez explained the primary distinction between treating “public generally” and “legally required participation” as exceptions to the general rule, rather than as elements of an

offense is the question of which party bears the burden of proof. For instance, if “public generally” is treated as an exception then the burden is on the disqualified official to raise the issue and prove that the exceptions apply. If it is treated as an element of the offense, the FPPC Enforcement staff believes it would have the burden of proof. Current regulations do not explicitly state which party has this burden. Furthermore, there have been no administrative law cases that specifically address this issue. Ms. Rodriguez said that if an administrative law judge misinterprets the Commission’s view regarding these exceptions it could result in an adverse decision. Staff believes that this is an issue that must be resolved.

Ms. Rodriguez concluded by saying that the proposed amendments would provide language clarifying the Commission’s interpretation of sections 87101 and 87103. The amendments would specify that in an enforcement proceeding for a conflict of interest violation, it is the respondent’s burden to establish that the “public generally” or “legally required participation” exceptions apply. Staff recommends approval to notice the proposed amendments to regulations 18700, 18707, and 18708 for adoption at the December meeting. Ms. Rodriguez offered to answer any questions.

Chairman Randolph asked for any questions or public comment.

There was none.

Chairman Randolph stated that she is definitely supportive of moving this amendment for adoption.

Commissioner Huguenin asked whether we had any sense of why the Commission declined to amend the language previously even though it concurred with the affirmative defense approach on “public generally.”

Ms. Rodriguez replied that it is unclear exactly why the amendment was declined; however, the minutes from prior meetings reflect that at least some of the Commissioners at that time did not think it necessary to have such explicit language in the regulations because they believed that the Commission’s approach was very clear from their perspective. Also, the regulation was part of a larger project known as Phase II, which involved many other regulatory changes.

The Commission agreed to schedule the item for adoption in December.

Item #19. Regulation Calendar for the Year 2006: Setting of Priorities.

Assistant General Counsel John W. Wallace presented the proposed regulatory calendar for 2006. Mr. Wallace said that this month staff would present a proposed list of regulatory projects. The Commission is asked to approve or modify the list of projects. In December a final regulatory calendar will be submitted and that calendar will reflect tentative meeting dates including interested persons meetings where appropriate. Mr. Wallace described the content of the memorandum: section (b), page 2, which sets out the new legislation that may need specific regulatory action in order to clarify its application. He noted that AB-1755 is discussed there. Mr. Wallace commented that after Commission materials were distributed, the Governor also

signed SB-8, which is the Soto bill. It expands revolving door restrictions to certain local officers. The act currently prohibits former members of state administrative agencies and former members of district boards from representing persons before their former state agency employers, and the bill would now expand that to certain local officers including city managers and local elected officers.

Chairman Randolph interjected to note for the benefit of the Commissioners that this an example of a bill where the Commission identified up front that it would have a significant cost because of the fact that it was expanding the revolving door law to the local level, which had not been done before, and the large number of new public officials that would be asking for advice. Some regulatory work is anticipated in regard to this. The Commission identified a cost of \$168,000 and will be forwarding a request for the funds to Finance now that the bill has been signed.

Mr. Wallace noted that on pages two and three in the memorandum, the items that currently are anticipated to carry over from 2005 are set out. The remainder of the calendar is very similar to what has been seen in the past. The items are grouped in order of time commitment anticipated, therefore the projects listed toward the front are most likely going to require the most staff time and those toward the back are expected to be easier. Mr. Wallace concluded with a final note that section (g), on page 12, refers to two public comments received last month for regulatory action. One was concerning campaign advertising on the radio and the other concerning the “public generally” exception. With respect to the first request, staff is recommending that it be considered in 2006. It looks like it may be a legislative matter but is something the staff recommends be put on the calendar. Regarding the second request, it is not believed that the specific issues that have been raised warrant a revisiting of issues that have already been dealt with by the Commission. However, it is recommended to the extent some of these issues come up in the existing “public generally” project on the calendar that they be considered. Mr. Wallace offered to answer any questions.

Commissioner Remy referred to Ms. Menchaca’s presentation on the budget in that it was not recommended that there be any increase in time spent on this function. He wondered if that meant the Commission could carry out the rather substantial amount of work, including the Soto bill, within the existing resources. Or does the Commission have enough staff to complete the workload it already has, and this will require additional effort.

Ms. Menchaca replied that it will be difficult to accomplish all of the workload but noted that what has helped in the past is that the divisions are able to approach the Commission with quarterly updates and further assess whether a particular project was easier or more difficult. The projects on the calendar that are “must do” can be completed with existing resources and those that are less urgent can be completed as resources allow.

Mr. Wallace directed the Commission to page nine in the memorandum that includes a section entitled “Helpful Projects” which lists many of the projects that are less urgent.

Ms. Menchaca added that it is anticipated that each attorney could be assigned two projects for the calendar year, perhaps one that is more complicated and one less time consuming. To assign

more than that per attorney would hurt the division's ability to approve the number advice letters sent out. That will be a guideline when assigning projects.

Chairman Randolph asked for any other questions and any public comment.

There was none. Mr. Wallace stated that the final regulatory calendar would be scheduled for December.

Item #20. Legislative Report.

Executive Director Mark Krausse addressed the Commission with the first three bills on the agenda this month that were pending the Governor's action. The first two were vetoed and veto messages are provided, and the third bill, SB-8, has been mentioned as having been signed and will require a substantial workload on the Commission's part. The \$168,000 cost estimate is actually an ongoing annual figure. The implementation costs for regulation writing will be incurred before any enforcement complaints come in and then the cost is anticipated based on the high volume of local enforcement activity expected. Additional enforcement personnel and some in technical assistance would be needed. The first two bills are both disclosure issues and the Governor said in his veto message he would work with the legislature to remedy the problems he saw with the bills. Mr. Krausse concluded that next month the Commission will address legislative proposals for the coming year.

Chairman Randolph asked for questions or comments.

There were none.

Item #21. Executive Director's Report.

Mark Krausse said that the only issue was the presentation of the budget itself and that due to the amount of the budget going to salaries and the cost of the building, there is very little left to cut and therefore, the Commission is very much in need of funding,

Chairman Randolph added that the Commission is losing Enforcement Division Attorney Natalie Bocanegra to private practice at Kaufman Downing in Los Angeles. The Commission congratulates Ms. Bocanegra and wishes her well.

Item #22. Litigation Report.

Luisa Menchaca reported on the DNC matter. She stated the appeal on the cross complaint was still pending before the court of appeal and on October 7, 2005 the request to deny the appeal was granted. The appeal was dismissed.

Chairman Randolph adjourned the meeting to closed session

Closed session ended at 12:18 p.m.

Chairman Randolph reported that no reportable action was taken during closed session.

The meeting adjourned at 12:20 p.m.

Dated: October 12, 2005

Respectfully submitted,

Kelly Nelson
Commission Assistant

Approved by:

Liane Randolph
Chairman